Testimony of

Mr. Joe Kraus

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Chairman Leahy and members of this committee, good afternoon. My name is Joe Kraus and I am a co-founder of digitalconsumer.org. We are a new consumer advocacy organization comprised of executives, entrepreneurs, venture capitalists and consumers who want to protect a consumer's personal use rights in the digital media world.

Before I begin the substance of my testimony I want to stress one point: I am a proponent of intellectual property. I am a technology entrepreneur. In 1993 I started a company called Excite which after 7 years became the third most trafficked site on the Internet. My professional success depended upon strong intellectual property protection. I am an IP believer.

However, I am concerned about recent trends. Historically, our country has enjoyed a balance between the rights of copyright holders and the rights of citizens who legally acquire copyrighted works. Generally speaking, rights holders have the exclusive right to distribute and profit from artistic works. Consumers who legally acquire these works are free to use them in certain noncommercial ways.

For example, we're all used to buying a CD and making a tape of it to listen to in our car. We're used to making mixed tapes of our favorite music. We're used to recording the football game so we can watch it after our child's soccer practice. We're used to buying a book and lending it to a friend. Essentially, we're used to having a reasonable degree of freedom as to how we use the media we buy.

It's important to emphasize that these rights are embodied in legislation and court decisions. Congress and the courts have carefully crafted a deliberate balance between media companies and ordinary citizens.

Unfortunately, this balance has shifted dramatically in recent years, much to the detriment of consumers, entrepreneurs and the risk capital markets.

Let me give you some examples, starting with the consumer.

This past Christmas I bought my dad a DVD player. Within two weeks I got a phone call. "It's broken" he insisted. When I asked why, he said that he put a DVD in and as he had become accustomed to doing with his video tapes, when the movie previews came up, he went to skip through them. But now, the DVD player wouldn't let him. I told him that his DVD player wasn't broken but that existing law made it illegal to create a DVD player that would skip through content that the media companies flagged as 'must watch'. Needless to say he didn't know what I was talking about.

Similarly, my mom bought an MP3 player recently. In early February I got a phone call from her saying 'my mp3 player is broken'. I asked why. She said that she had been putting CDs on her mp3 player but that a couple of the CDs she recently bought didn't seem to transfer. I told her she probably had some of the new "copy protected" CDs. She asked what that meant. I explained that while she was granted the right in the 1992 Audio Home Recording Act to make personal use copies of CDs, in 1998 her ability to do so was taken away if the record companies tried to prevent the making of those personal use copies. Needless to say, she didn't know what I was talking about either.

I now have a big X marked on my calendar waiting for the phone call from my parents when the new digital television standards are implemented. The standards currently envision a market where a network broadcaster like Disney's ABC gets to decide what programs my parents are allowed to record and which ones they aren't. I can just hear them saying 'Joe, why can we record the nightly news but not 'Everybody Loves Raymond?'

While I understand the desire of the content industry to prevent illegal copying, I believe it would be a disservice to the hundreds of millions of law abiding consumers in this country if the debate over preventing illegal copying suddenly stripped them of their ability to record TV shows they've paid for in their cable bill or copy CDs they've bought onto their mp3 players to listen to them in the gym.

The solutions that the content industry has advanced to date have been more effective at preventing my mom from copying her legally bought music to her MP3 player that an diminishing major commercial piracy operations in China and Taiwan. As we all know, copy protection isn't breakable by my mother, but is very breakable by many people with computer backgrounds. In addition, I believe that the effect of denying citizens their personal use rights is to drive consumers toward illegal downloading. If I buy a CD that I can't put on my mp3 player, but I can illegally download a song that I can take anywhere, which one am I going to choose?

In the debate over how we prevent illegal copying, my parents, unbeknownst to them, are losing their historic personal use rights. This is wrong and cannot be allowed to continue unabated.

The cloud around personal use rights affects not only consumers but innovation and the capital markets as well.

My business partner, Graham Spencer, is a computer programmer. Much of his time is spent getting different software systems to talk to one another. The act of examining a legally acquired computer program or hardware device for the purpose of analysis, debugging, or compatibility has traditionally been considered a "fair use." However, the same laws that are depriving consumers of their fair use rights are also being applied to programmers. The result is a chilling effect on software and hardware innovation. The problem is severe enough to have attracted the attention of some of the country's best software engineers.

In addition, major media companies have used lawsuits in attempts to stop or delay consumer electronics devices that deal with personal use; it began with the introduction of the VCR, continued with the MP3 player and most recently is occurring with the ReplayTV personal video

recorder. These devices were all designed to make it easier for consumers to enjoy the media they paid for.

However, when new consumer electronics introductions yield new lawsuits from the media companies, these lawsuits inhibit investment. Geoff Yang, head venture capitalist at silicon-valley based Redpoint Ventures and lead investor in Tivo, a personal video recording technology company, puts it this way. "given the current state of the DMCA, I can't see how we could invest in another revolutionary consumer technology such as TiVo given the cloud currently surrounding personal use of the media people already own. This issue must be resolved before venture investment to seed the consumer technology future can continue."

Our organization therefore is advocating a set of principles we call the "consumer technology bill of rights". It is a proposal we hope this Committee will seriously consider as it is simply an attempt to positively assert the consuming public's personal use rights. These rights aren't new; they are historic rights granted in previous legislation and court rulings which have over the last four years been whittled away. These include the right to "time-shift" - to record a television program and watch it later; and the right to "space shift" - to copy a piece of music from a CD to a walkman or mp3 player or to make a mixed tape. The full list of rights can be viewed at our web site, www.digitalconsumer.org or I'm happy to provide a written list to anyone who would like to read them.

Clarifying, asserting, and defending personal use rights is good for consumers and good for investment. Citizens will have a simple, comprehensible set of laws that re-establish rights that they used to have. And, investors will have clarity on those areas that are safe for capital without the risk of litigation.

Finally, there has been some talk lately of a need to create a government mandated open standard for digital rights management in order to ensure interoperability for consumers. I think a government standard would be harmful to consumers and innovators for several reasons.

First, a government mandated standard is not necessary to ensure interoperability. The market demands interoperability and has no need for the government to insist on it. Examples abound. There is no government mandate for CD player interoperability, yet all CDs play in all CD players. Likewise for DVDs. Consumers don't tolerate the lack of interoperability and as a major market force, they demand it. Therefore, interoperability will occur as a natural effect of the market. (Although no standard has yet emerged for secure digital music, this is due at least in part to the fact that the existing technologies are too burdensome for the consumer. Once a suitably user-friendly technology has emerged, consumers are likely to embrace it.)

Second, government mandates are bad for innovation generally because they assume that the government is able to predict all possible fair and legal uses of technology or content. The very definition of innovation is the discovery of something new and unexpected; by mandating a set of legal uses and criminalizing all others, the government makes innovation difficult.

Third, overly protective copyright laws themselves contribute to technologies that do not interoperate. Interoperability depends on being able to examine data formats, and as long as such

examination is criminalized, companies will be restricted in their ability to create compatible products.

Finally, if the government decides to mandate an open standard, there is no guarantee it will truly remain open. Microsoft has a history of "embrace and extend" policies where an open standard is adopted and then modified or extended in order to introduce proprietary features which licensing vendors are encouraged to exploit. The new "expanded standard" meets the basic criteria of the open standard, but if this expanded standard is used to its fullest, it will have features that the original open standard cannot understand; therefore, the open standard becomes less and less effective. Examples of this behavior include the Java programming language, the HTML page layout standard, and the Kerberos security technology.

Overall, I encourage Congress to remain wary of any solution where it is asked to "mandate" standards in the technology industry. Technological innovation moves too quickly and unpredictably to be constrained in this way. In addition, consumers already exert market forces to ensure a reasonable outcome.

Under the guise of "preventing illegal copying" I believe Hollywood is using the legislative process to create new lines of business at consumers' expense. Their goal is to create a legal system that denies consumers their personal use rights and then charge those consumers additional fees to recoup them.

After years of successful litigation and legislative efforts, many in the entertainment industry are back in Washington asking for more changes to the law. All the while, they have been quietly developing services, technologies and products that eliminate fair use for their customers, your constituents. Many in the copyright community will not admit that there is such a thing as fair use. They will not admit that once consumers have legally purchased media that they should be free to engage with it in a wide variety of personal uses. This denial persists despite 30 years of Congressional action and Supreme Court rulings affirming consumers' fair use rights. And, while I am not a lawyer, I do know this much: consumers believe they have personal use rights and they expect Congress to insure that they are safeguarded. Copy protection, especially overseas piracy for illicit sale, is an important issue. But before this Committee considers yet another change in the law at the behest of the copyright cabal, I would respectfully urge you to insure that the interests of the consumer are insured.

Thank you very much for the time to address this committee today.